STATE OF MICHIGAN

IN THE SUPREME COURT

NATIONAL WINE & SPIRITS, INC., NWS MICHIGAN, INC., and NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiff-Appellants

v

STATE OF MICHIGAN,

Defendant-Appellee

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court No. 126121

Court of Appeals
No. 243524

Circuit Court for the County of Ingham
No. 02-13-CZ

ORAL ARGUMENT REQUESTED

MILLER, CANFIELD, PADDOCK and STONE, P.L.C.
Louis B. Reinwasser (P37757)
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070

SIEGEL, MOSES & SCHOENSTADT, P.C.
Morton Siegel, *pro hac vice*
444 N. Michigan Ave.
Suite 2600
Chicago, IL 60611
(312) 658-2000
Attorneys for Plaintiff/Plaintiffs

MIKE COX
ATTORNEY GENERAL
Howard E. Goldberg (P14095)
Assistant Attorney General
Attorneys for Defendant/Appellee
Department of Attorney General
(248) 888-8800

WILLINGHAM & COTE, P.C.
Anthony S. Kogut (P31697)
Attorneys for Intervening Defendant/Appellee
333 Albert Avenue, Suite 500
East Lansing, MI 48823-4394
(517) 351-6200

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I. THE FUNDAMENTAL PURPOSE OF THE COMMERCE CLAUSE IS TO PROTECT ALL INTERSTATE COMPETITORS, INCLUDING SERVICE PROVIDERS

Having apparently become disenchanted with their primary arguments made to the trial court and the Court of Appeals, Defendants[1] have changed course and now raise a brand-new argument, i.e., that the Commerce Clause only protects products and not services.[2] Defendants' erroneous attempt to justify a protectionist statute is an affront to one of the most important provisions of the United States Constitution. The fundamental, longstanding purpose of the Commerce Clause is to protect, foster and encourage competition between and among the states. Our courts have consistently placed a broad interpretation on the application of the Commerce Clause rather than fit it into a box, as Defendants attempt here. Commerce Clause jurisprudence encompasses all aspects of commerce involving alcohol, including but not limited to products, service and taxes.[3]

Defendants provide almost no support for this new argument, other than quoting from *Granholm v Heald*, 544 US 460; 125 S Ct 1885; 161 LE2d 796 (2005), language to the effect that the Commerce Clause protects the market for out-of-state goods.[4] That the *Granholm* Court would say this is not surprising since the *Granholm* case involved only goods and not services. Of course when the U.S. Supreme Court says that the Commerce Clause protects out-of-state goods, this does ***not*** mean that it does ***not*** protect out-of-state services. In the over 100 pages of briefing

[1] Defendant-Appellee State of Michigan ("State") and Intervening Defendant-Appellee Michigan Beer and Wine Wholesalers Association ("Intervenor") are referred to collectively as "Defendants."

[2] Arguments raised for the first time on appeal need not be considered by this Court. *Booth Newspapers, Inc v University of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993).

[3] See, e.g., *Granholm v Heald*, 544 US 460; 125 S Ct 1885; 161 LE2d 796 (2005); *Camps Newfound/Owatonna, Inc, v Harrison,* 520 US 564; 117 S Ct 1590; 137 LE2d 582 (1997), n. 10.; *Bacchus Imports Ltd v Dias*, 468 US 263, 270; 104 S Ct 3049; 82 L Ed 2d 200 (1984).

[4] Defendants rely on this language in *Granholm*: "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." E.g., State's brief, p. 21. If anything, this quote suggests that the Twenty-first Amendment does not protect any state law until the mandates of the Commerce Clause are met.

submitted in opposition to this appeal, there is not one case cited that stands for the proposition that out-of-state companies that provide services are not protected by the Commerce Clause. On the other hand, Plaintiffs have cited in their appeal brief numerous cases where the courts have declared statutes unconstitutional that bar from in-state markets, out-of-state companies that only provide services. See for example, *Lewis v BT Investment Managers, Inc*, 447 US 27; 100 S Ct 2009; 64 LE2d 702 (1980), where the Court invalidated a Florida law that prohibited out-of-state bank holding companies from owning subsidiaries in the state of Florida. In that case, the application for licensing filed by the out-of-state company proposed that the subsidiary of the holding company would provide "portfolio investment advice, as well as general economic information and advice, general economic statistical forecasting services, and industry studies to persons other than banks." *Id.* at 30. There is no question that this subsidiary would provide only *services* to its Florida customers. Yet the Court had no trouble declaring unconstitutional the Florida statute that prohibited entry of the subsidiary into the Florida financial market. If the Commerce Clause did not protect companies that provided services, surely the Florida statute would not have been invalidated.

Likewise in the case of *C & A Carbone, Inc v Clarkston,* 511 US 383; 114 S Ct 1677; 128 LE2d 399 (1994), the Court invalidated a statute that required all solid waste to be processed at a local facility. There the local town argued that there was no discrimination because its ordinance erected no barrier to the import or export of any solid waste, whether coming from in-state or out-of-state. The Court found, however, that "...the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id.* at 391. In a case that cites *Carbone,* the Court leaves no doubt on this issue. "We have long noted the applicability of our dormant commerce clause jurisprudence to service industries." *Camps Newfound/Owatonna, Inc, v Harrison,* 520 US 564; 117 S Ct 1590; 137 LE2d 582 (1997), n. 10.

The cases could not be clearer. The Commerce Clause protects all facets of interstate commerce from interference by local interests. Defendants' attempt to split off all other aspects of alcoholic beverage commerce from "products" is an artificial distinction that has neither support in logic nor the law. Even if there were no goods involved in the instant case,[5] the Commerce Clause would still protect Plaintiffs[6] when they attempt to enter the Michigan market.[7]

Section 205(3) is an unconstitutional manipulation of competition for the benefit of the Intervenor's members. It is the duty and responsibility of the courts to strike down such protectionist legislation without further inquiry.

II. THE EXXON CASE IS EASILY DISTINGUISHABLE.

All of the parties opposing[8] this appeal rely heavily on the case of *Exxon Corp v Governor of Maryland*, 437 US 117; 98 S Ct 2207; 57 LE2d 91 (1978), for the proposition that "the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations…." Appellee's Brief p. 20. Plaintiffs are not sure of the point the opposing parties are trying to make. It has never been Plaintiffs' contention that § 205(3) has a negative impact *only* on Plaintiffs. On the contrary, Plaintiffs have consistently taken the position that *all* out-of-state firms that might wish to become an ADA/wine wholesaler will be effectively barred from doing so by § 205(3). This is a dispositive distinction between the case at hand and *Exxon*. One significant reason that the Court in *Exxon* refused to find discrimination against

[5] Contrary to the assertion of Intervenor (see n. 9 in its appeal brief), there are goods at stake in this case. There is no dispute that Plaintiffs are wholesalers which means that they buy wine from suppliers and sell to retailers. To the extent they or others like them are precluded from entering the Michigan market for wholesalers, it is their products that are not sold and distributed in Michigan.

[6] Plaintiff-Appellants, National Wine and Spirits, Inc., NWS Michigan, Inc., and National Wine and Spirits, LLC are referred to collectively as "Plaintiffs."

[7] To the extent Defendants are arguing that Plaintiffs are not engaged in interstate commerce, federal statutory law mandates otherwise. All wholesalers of alcoholic beverages must obtain a federal Basic Permit. The mere act of purchasing distilled spirits, wine and malt beverages is deemed by statute to be engaging in interstate commerce. 27 USC §203; *Hanf v US,* 235 F2d 710, 717 (CA 8 1956).

[8] Defendants and *Amici Curiae* General Wine & Liquor Company, Inc. ("General") and Vintage Wine Company are sometimes collectively referred to as "opposing parties."

interstate commerce was because the statute in question did not bar *all* out-of-state companies from owning retail gasoline stations. It only barred one aspect of the out-of-state market, i.e., gasoline producers and refiners, from owning gasoline stations in the state of Maryland.[9] Another whole segment of the out-of-state market–independent sellers–could still own gasoline stations. Thus, the Court found that the impact on interstate commerce was not significant enough to declare the statute unconstitutional. The Court also relied on the fact that there were no in-state producers or refiners of gasoline so there could be no discrimination in favor of this class of gasoline station owners. *Exxon, supra* at 125.

When these facts are compared to those in the case at hand, it is clear that *Exxon* does not aid the opposing parties' cause. Since all out-of-state alcoholic beverage wholesalers will be placed in exactly the same position as Plaintiffs vis-à-vis in-state wholesalers who are or become ADAs, there is ***no*** segment of the out-of-state market that will escape the negative impact of § 205(3). ***No*** out-of-state distributor will be able to effectively compete with the in-state wine wholesalers who will have the insurmountable advantage of being able to act as an ADA while at the same time selling all the brands of wine they sold prior to September 24, 1996, as well as being able to compete for any unrepresented brands of wine coming to market after that date. This is not a case where the availability of the local market is shifted from one segment of the out-of-state market to another segment of the out-of-state market, as was the case in *Exxon*. There can be no dispute that because every wine wholesaler in existence on September 24, 1996 was a resident

[9] The challenged law was passed and the case was decided during a time when there were extreme gas shortages across the county.

in-state company, this segment of the in-state local market is protected from every out-of-state company wishing to become an ADA/wine wholesaler.[10]

Furthermore, in the case at hand, there clearly are local ADA/wine wholesalers who are not negatively impacted by § 205(3). Unlike *Exxon* where there were no local producers/refiners, and therefore, according to the Court, there could be no discrimination in favor of them, there is ample discrimination in favor of local business entities here.

The opposing parties tried to concoct an argument from the *Exxon* decision to the effect that, as long as there are ample brands of wine finding their way to Michigan for sale to consumers, the Commerce Clause has not been violated. This appears to be some variation on the argument that the Commerce Clause protects only the flow of goods and not services. As shown above, this argument has no merit. Likewise, the *Exxon* case does not provide support for the claim that there can be no violation of the Commerce Clause as long as no products are excluded from the market. If that were the case, the Courts in *Lewis* (which has an extended discussion distinguishing *Exxon*) and *Carbone* would have found that there were no constitutional violations as there was no evidence in those cases that out-of-state products were excluded. The correct question derived from *Exxon* is whether some in-state businesses receive favorable treatment and all similarly situated out-of-state businesses are impacted negatively. If so, there is a Commerce Clause violation. The *Exxon* Court would find such a violation here.

III. <u>PLAINTIFFS ARE NOT ASKING THIS COURT TO LEGISLATE.</u>

The opposing parties repeatedly assert that Plaintiffs' remedy is with the Legislature, not with the Court. They do not understand the requirements of the Commerce Clause. When a

[10] Plaintiffs acknowledge that this negative impact may also affect resident ADA/wine wholesalers that did not have any brands of wine prior to September 24, 1996. But as argued at length in Plaintiffs' Brief on Appeal, pp. 26-28, merely because some of the local market is negatively impacted does not alleviate the unconstitutional discrimination that favors another segment of the local market at the expense of the out-of-state market.

statute discriminates against interstate commerce or places an undue burden on interstate commerce, the state has the affirmative burden of establishing that the statute (1) furthers a legitimate state purpose, and that (2) there is no less discriminatory means for achieving that purpose. Defendants assert that the State's purpose in adopting § 205(3) was to protect the middle tier of the wine distribution system from competition from ADA/wine wholesalers. Plaintiffs have shown that the scheme selected by the Legislature when it adopted § 205(3), while protecting wine wholesalers from out of state competition, does not truly protect the middle tier because it subjects them directly to competition from the two largest in-state wine wholesalers who also became ADAs.

Plaintiffs suggest that a better solution to effect this apparent goal would have been to preclude wine wholesalers from becoming ADAs and ADAs from becoming wine wholesalers.[11] This is part of a Commerce Clause analysis mandated by numerous Supreme Court cases. Legislatures are not given carte blanche to adopt any policy they desire; they are bound by the Constitution. Courts are also constitutionally bound to invalidate any law that exceeds the constitutional powers of a state legislature. That is not a court legislating; it is a court honoring the Constitution.

IV. § 205(3) DOES NOT AFFECT THE STRUCTURE OF THE THREE-TIER SYSTEM

There is nothing in the Congressional record, the record of the Constitutional Convention or current jurisprudence concerning the Twenty-first Amendment that supports the argument made by opposing parties here that the authority delegated to the states to structure the distribution system within the state allows disparate treatment between similarly situated licensees. Nevertheless, the opposing parties want the Court to believe that § 205(3) has something to do with the "structure" of the three-tiered distribution system for wine. ("Rather, § 205(3) reflects

[11] This is a natural and fair classification not subject to constitutional challenge.

structure." Intervenor's Brief, p. 13). However, just because they make this assertion repeatedly does not make it so; they have completely failed to substantiate this claim with any facts or law.

The three-tier system is just that: the 21st Amendment permits states to implement three tier distribution systems if they see fit. And, states can prohibit the vertical integration of the various tiers, as the state of Michigan has done. These are matters of ***structure*** of the distribution system. If § 205(3) added a fourth tier to the system, reduced the system to two tiers, or permitted vertical integration amongst some or all of the tiers, then it might affect the structure of the distribution system.

§ 205(3), however, does none of these things. § 205(3), to the extent it has anything to do with the wine distribution system, only deals with the middle tier of that system. Defendants have themselves said over and over again: Sec. 205 protects the middle tier of the wine distribution system. It does so, according to Defendants, by permitting certain occupants of that middle tier to dual while precluding others from enjoying that benefit. Using the analogy of a house, the wine wholesalers would be the second floor, the retailers would be the third floor, and the suppliers would be the first floor. § 205(3) does not change the relationship of those floors in any way; at most, it moves the second floor furniture around a bit.

Of course, the opposing parties want this case to be about the three-tier system because courts, such as in *Granholm*, have legitimized the three-tier system. But even *Granholm* recognized that statutes affecting the structure of the system are not immune to Commerce Clause challenges. The statute declared unconstitutional in *Granholm* had much more to do with the distribution system for alcoholic beverages than § 205(3). That law allowed in-state wineries to use a two-tier system for distributing their wines, permitting them to sell directly to consumers and thereby cutting out the middle tier. The law, before it was declared unconstitutional, effectively created a two-tier system for in-state wineries, and a three-tier system for out-of-state wineries. If states have carte blanche when it comes to structuring their distribution systems, as Defendants contend, why did *Granholm* strike down the system adopted by Michigan? Clearly the Commerce Clause must be reckoned with even where the statute at issue directly affects the structure of the distribution system. See n. 4 above. In a case like the case at hand, where the statute has nothing to do with the structure of the three-tier system, Defendants' arguments are even less convincing.

V. **THERE CAN BE NO DISPUTE THAT § 205(3) IS PROTECTIONIST**

The opposing parties present a moving target, comparing Plaintiffs sometimes to non-ADA wine wholesalers, and sometimes to post-1996 ADA/wine wholesalers. However, arguing that Plaintiffs did not have to become an ADA and could therefore enjoy the same rights as a non-ADA wine wholesaler to dual, or that Plaintiffs are in exactly the same position as post-1996 ADA/wine wholesalers, misses the point. When you compare Plaintiffs' rights under Michigan law to those of pre-September 24, 1996 wholesalers who became ADAs, it is clear that this latter group enjoys a huge competitive advantage over Plaintiffs.[12] As shown at length, the two major wine wholesalers in Michigan were given the right to continue marketing brands that Plaintiffs—or any other out-of-state distributor—cannot even compete for. The opposing parties play a word game by insisting that everyone is subject to the same rules. But even if this is technically true, this does not mean that § 205(3) does not discriminate against Plaintiffs. If the rules were all that mattered, the Legislature could pass laws that, for example, gave businesses in Group A $1 million start-up capital, and comparable businesses in Group B no start-up capital, but subjected both groups A and B to the same restrictions. The opposing parties would say that law does not discriminate because it places the same restrictions on both Groups A and B. Of course, there is clear discrimination and favoritism because of the advantage given to Group A, and that is

[12] Although currently this group has only two participants, TransCon and General, it could grow: the law allows every pre-1996 wine wholesaler to seek appointment as an ADA, while enjoying the huge competitive advantage of selling all the wines they sold prior to September 24, 1996.

precisely the situation now presented to this Court. Plaintiffs just want a level playing field so that they have a fair shot at competing with the other ADA/wine wholesalers. § 205(3) denies them that opportunity.

VI. **THE PLAYING FIELD IS NOT LEVEL.**

Intervenors and *amici* assert that Plaintiffs have not been prejudiced by § 205(3), and submit figures showing the gross revenues earned by NWS Michigan, Inc., acting in its capacity as an ADA. These numbers prove nothing other than that NWS Michigan, Inc. distributes more cases of liquor for the state than the other ADAs. The real issue regarding prejudice caused by § 205(3) would be established by a comparison of the *costs* associated with that distribution. Because TransCon[13] and General have huge wine wholesaling operations and can take advantage of the significant cost economies arising from being both an ADA and a full-fledged wine wholesaler, their profits are likely to be significantly higher than Plaintiffs whose costs are only defrayed by payments received from the State for warehousing and distribution of its distilled spirits. On the other hand, TransCon and General get to defray their costs both with the payments received from the State *and* from payments received from retailers that purchase the cases of wine that TransCon and General warehouse and distribute with the same facilities used to warehouse and distribute distilled spirits. Thus, the numbers representing gross revenues received are absolutely meaningless in the context of this litigation. They do not show that Plaintiffs have not been "disadvantaged by Sec. 205." Intervenor's Brief, p. 7.[14]

[13] TransCon, General and NWS Michigan, Inc. are the three largest ADA/wholesalers.
[14] Plaintiffs object to another effort by Intervenors to distort the record in this case. In at least two places they assert that Plaintiffs have admitted that payments received from the State give them a "combined cost economy, in effect a subsidy." Intervenor's Brief, pp. 12 and 15. The payments received from the State have nothing to do with the combined cost economy at issue here. As noted above, the cost economy is the result of using the same facilities to warehouse and distribute both wine and distilled spirits. The payments received for those services, whether on the wine side or the distilled spirits side, do not create that economy. The "cost economy" is manifested by lower costs incurred by the ADA/wholesaler.

VII. THERE IS NO EVIDENCE THAT ALLOWING ADA/WINE WHOLESALERS TO DUAL WILL DESTABILIZE THE MIDDLE TIER OF THE WINE DISTRIBUTION SYSTEM.

The rationale which the opposing parties seem to espouse to support the discrimination against Plaintiffs is that allowing ADA/wine wholesalers to have full access to the wine supply market would destabilize the middle tier of the wine distribution system, thereby contravening a core concern of the Twenty-first Amendment, i.e., orderly markets.[15] Plaintiffs do not deny that if they are allowed to sell the same brands of wine as the in-state ADA/wine wholesalers, they will be able to compete much more successfully with other wine wholesalers. They totally disagree that allowing them this freedom to compete will somehow destabilize the middle tier of the wine distribution market. The State has admitted that the bulk of that market is already handled by two ADA/wine wholesalers and that if Plaintiffs were allowed access to the same brands as the other two ADA/wine wholesalers, the three companies would cover the lion's share of that distribution

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Nor is this payment a subsidy. None of the opposing parties who all insist on mischaracterizing these payments, have addressed the definition of "subsidy" that was included in Plaintiffs' Brief on Appeal. They intentionally ignore the definition of subsidy in the apparent hope that if they keep saying it repeatedly, the Court will somehow buy into their mischaracterization. A subsidy is an outright grant of money or an overpayment for services. See Appellant's Brief on Appeal, n. 23. The cases cited by Intervenor dealing with subsidies make this clear. One dealt with rent subsidies, another dealt with recipients of welfare, and the third dealt with food stamp recipients. Intervenor's Brief, p. 27. It is ludicrous to compare these subsidies to the payments for services received by ADAs. Plaintiffs would invite *amicus* General to submit an affidavit confirming that it is receiving overpayments from the State for the services it provides as an ADA.

[15] *Granholm* has made it clear that the core concerns of the Twenty-first Amendment receive no special prominence where the Commerce Clause is concerned. If a statute violates the Commerce Clause, a state can argue that it has a legitimate purpose that outweighs the Commerce Clause concerns, and that the statute in question is the only practical way to accomplish that purpose. This list of purposes could include Twenty-first Amendment core concerns such as "orderly markets," but such concerns get no more deference than other state concerns such as health, safety and welfare. Another recent case makes this clear. In *Costco v Hoen,* __ F Supp 3d __ (WD Wash, April 21, 2006) 2006 US Dist LEXIS 27966, the court found that several state laws regulating pricing, warehousing, credit sales, etc., did not advance the core concerns of the Twenty-first Amendment. As far as orderly markets were concerned, the court found that the state had presented "no persuasive evidence" that the price controls and other measures would protect small retailers, and even if they did, this interest was "outweighed by the federal interest in promoting competition. As the Supreme Court has noted, a state's 'unsubstantiated interest in protecting small retailers simply [is] not of the same stature as the goals of the Sherman Act.'" *Id* at 24. Likewise, in the case at hand, the State's unsubstantiated interest in protecting wine wholesalers does not outweigh national interests protected by the Commerce Clause.

market. See State's Brief, pp. 22-23. However, there has been absolutely no proof that this result would destabilize the wine distribution system. Affidavits have been submitted saying that some wine wholesalers would not be able to compete with ADA/wine wholesalers, but even if that is true (one suspects it is not true since TransCon and General already have 70% of the wine wholesale market, Appellants' Appendix 123a), that does not mean that the middle tier will be destabilized. [16]

In fact, if the Court looks at the *distilled spirits* distribution system, it will see that these same three entities effectively handle almost all of the warehousing and distribution functions for the entire state. Intervenor's Brief, p. 6. If the state of Michigan is so concerned that having only three large wine wholesalers will destabilize the wine distribution system, why is it so *unconcerned* that these three same companies have effectively handled the distribution of nearly all distilled spirits? This fact that the State uses the same three companies to handle almost all of the distribution of distilled spirits in the State is the best evidence going to the question of whether using these three companies to distribute wine to retail outlets in Michigan will somehow destabilize the wine market. There is every reason to believe that these three companies will do just as good a job with wine as they do with distilled spirits. The claim that destabilization will occur is completely unsubstantiated.

[16]Concrete, persuasive proof, not mere speculation that § 205(3) will destabilize the middle tier, is required. "In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The "burden is on the State to show that 'the *discrimination* is demonstrably justified,' " *Chemical Waste Management, Inc v Hunt,* 504 US 334, 344; 112 SCt 2009; 119 LEd2d 121 (1992) (emphasis in original). The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. See, *e.g., Maine v Taylor,* 477 US 131, 141-144; 106 S Ct 2440; 91 LEd2d 110 (1986). Michigan and New York have not satisfied this exacting standard." *Granholm, supra* at 492-493.

VIII. PLAINTIFFS MAY RAISE THE RESIDENCY ISSUE WITHOUT CHALLENGING THE CONSTITUTIONALITY OF § 601.

The opposing parties seem to argue, at least by implication, that the failure to formally challenge the constitutionality of § 601 somehow means that the effects of § 601 on § 205(3) cannot be taken into account when determining whether or not the latter statute is facially discriminatory. The opposing parties have cited no authority for the proposition that the Court can only consider the effects of a statute if it is formally challenged in the complaint. As argued at length in Appellant's Brief on Appeal, the law is clear that statutes pertaining to the same subject must be read *in pari materia* with each other. The Court would be remiss to turn a blind eye to the effect of § 601 when considering whether or not § 205(3) is discriminatory.

In any event, even if the Court were to agree with the opposing parties on this issue, and not consider the effects of § 601, this would only impact Appellant's argument that § 205(3) is facially discriminatory. It would have no effect on Appellant's argument that as applied, § 205(3) is equally discriminatory.

At least some of the opposing parties argue that *Granholm* stands for the proposition that states can insist on residency for licensed wholesalers. The opposing parties refer to dicta in the *Granholm* decision where the Court quotes from another Supreme Court case that said that states can require suppliers to sell their products through "a licensed in-state wholesaler." *Granholm, supra* at 489. Intervenors argue that everyone knows that the word "in-state" is just another word for "resident." While this may be true in some cases, it is much more likely that the *Granholm* Court was indicating by this language only that states can require suppliers to sell their products to *licensed* wholesalers; in other words, that states can enforce the three-tier system. Whether that licensed supplier is a resident of the state or not was not an issue in *Granholm,* nor in the case quoted by the *Granholm* Court. That this conclusion attributed to the *Granholm* Court by the opposing parties is erroneous is obvious when viewed in the context of the rest of the *Granholm* decision, in particular, the decision dealing with New York statutes in the companion case of *Swedenberg v Kelley.* In connection with that decision, the *Granholm* Court stated: "New York's in-state presence requirements runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Granholm, supra* at 475. Granted, this case dealt with the residency of a supplier, the first tier of the three-tier system, but there is no reason to believe that occupants of the second tier, i.e. wholesalers, would be treated any differently by the Court when it comes to residency. There is no doubt that the State can require wholesalers to obtain a *license* from the state, but it is clear from the decision in *Granholm* and numerous other Supreme Court cases that requiring *residency* to have access to a state's markets is a violation of the Commerce Clause.

IX. THE RESTRICTION ON ACCESS TO SUPPLIERS MAKES IT VIRTUALLY IMPOSSIBLE FOR PLAINTIFFS TO COMPETE IN THE WINE WHOLESALE MARKET.

In its updated Commerce Clause analysis, Anderson Economic Group concludes that "relegating wholesalers to 5%, 10%, 20%, or even 30% of the market would be a punishing burden in this industry." Appellant's Appendix 181a. Anderson Economic Group's review of national markets reached the conclusion that only 12.2% of total brands in the wine industry could be considered new brands. Appellant's Appendix 203a. That this is a generous calculation, meaning that Anderson Economic Group erred on the side of over-estimating the number of new brands for which Plaintiffs could compete under § 205(3)'s restrictions, is apparent from the affidavit of Michael V. Rosch, Exhibit 1 to the amicus brief. Mr. Rosch claims to be the general manager, wine division, of General Wine & Liquor Company. He indicates that "approximately 35 brands of wine are new to General Wine & Liquor since 1996." To put this in perspective, a review of the affidavit of Julie Wendt, the director of licensing for the Michigan Liquor Control

Commission (Intervenor's Appendix 22b), is helpful. Ms. Wendt asserts that "over 20,000 brands of wine are registered for resale in the state of Michigan by out-state sellers of wine." Intervenor's Appendix 23b. There is no dispute that General is one of the largest wine wholesalers in Michigan. If over the past ten years it has been able to acquire only 35 new brands of wine, it is reasonable to assume that Plaintiffs would have had no better luck in attracting new brands over this same period of time because they do not have the "critical mass" of wine brands that makes it easier to attract new brands. Appellants' Appendix 188a. This puts anyone who is limited to competing for new brands, such as Plaintiffs, in a very bad market position, as noted by Anderson Economic Group. There is no way that a major wine wholesaler could be competitive if it is representing less than .2% of the available brands.[17] Of course, General maintains its competitiveness because it was allowed to continue marketing all the brands of wine it marketed prior to 1996. Plaintiffs are precluded from marketing those wines by § 205(3). The discrimination is obvious.

CONCLUSION

For these reasons and those set forth in Appellant's Brief on Appeal, Plaintiffs respectfully request that this Court reverse the lower court's decision granting Defendants' joint motion for summary disposition and refusing to grant Plaintiff's motion for summary disposition.

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[17] The fact that Plaintiffs might be able to buy or merge with a pre-1996 wine wholesaler cannot be grounds for declaring § 205(3) constitutional. The out-of-state wineries in New York that sued in the *Swedenburg* case could have bought in-state facilities to more successfully compete with in-state wineries, but the Court said that such a requirement was unconstitutional. *Granholm, supra* at 575-576.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
LOUIS B. REINWASSER

By: ______________________________
Louis B. Reinwasser (P37757)
Attorneys for Plaintiff
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070
reinwasser@millercanfield.com

SIEGEL, MOSES & SCHOENSTADT, PC
MORTON SIEGEL

By: ______________________________
Morton Siegel
444 North Michigan Avenue
Suite 2600
Chicago, IL 60611
(312) 658-2000

Attorneys for Plaintiff

Dated: May 16, 2006

LALIB:141693.3\114169-00003